

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

UNITED STATES OF AMERICA

V.

Case No. 1:14-CR-876-01

KEVIN LYNDEL MASSEY,

DEFENDANT

**DEFENDANT KEVIN LYNDEL MASSEY'S
OPPOSED MOTION TO SUPPRESS ILLEGALLY SEIZED EVIDENCE AND
ILLEGALLY OBTAINED STATEMENTS**

TO THE HONORABLE ANDREW S. HANEN:

The Defendant in the above styled and numbered cause, Kevin Lyndel Massey, under the Fourth and Sixth Amendments to the United States Constitution, respectfully moves the Court for an order suppressing evidence and statements illegally seized from the Defendant. In support of this motion, Kevin Lyndel Massey would show the Court as follows:

I. CHARGES

1. Defendant Kevin Lyndel Massey (hereinafter MASSEY), has been charged in a five (5) count indictment with four (4) counts. Count One of the indictment charges that on or about August 29, 2014, MASSEY, having been convicted on March 1, 1988 of a crime punishable by imprisonment for a term exceeding one year, did knowingly possess in and affecting interstate commerce a firearm, that is one Springfield model XDS, .45 caliber pistol, bearing serial number XS664509, said firearm having been shipped in interstate commerce. 2.

2. Count Two of the indictment charges that on or about August 29, 2014, MASSEY, having been convicted on March 1, 1988 of a crime punishable by imprisonment for a

term exceeding one year, did knowingly possess in and affecting interstate commerce a firearm, that is one Centurion model 39 Sporter, 7.62 x 39mm rifle, bearing serial number 39NC02585, said firearm having been shipped in interstate commerce.

3. Count Three of the indictment charges that on or about October 20, 2014, MASSEY, having been convicted on March 1, 1988 of a crime punishable by imprisonment for a term exceeding one year, did knowingly possess in and affecting interstate commerce a firearm, that is one HS Produkt model XDS, .45 caliber pistol, bearing serial number XS613495, said firearm having been shipped in interstate commerce.

4. Count Four of the indictment charges that on or about October 20, 2014, MASSEY, having been convicted on March 1, 1988 of a crime punishable by imprisonment for a term exceeding one year, did knowingly possess in and affecting interstate commerce a firearm, that is one HS Produkt model Tactical XD, .45 caliber pistol, bearing serial number US777533, said firearm having been shipped in interstate commerce. All counts in violation of Title 18, United States Code Sections 922(g)(1) and 924(a)(2).

5. On or about August 29, 2014, the government seized the following items as a result of an unlawful search:

One Springfield model XDS, .45 caliber pistol, bearing serial number XS664509;
One Centurion model 39 Sporter, 7.62 x 39mm rifle, bearing serial number 39NC02585; and
secured statements from MASSEY.

6. On or about October 20, 2014, the government seized the following items as a result of an unlawful search:

One HS Produkt model XDS, .45 caliber pistol, bearing serial number XS613495;

One HS Produkt model Tactical XD, .45 caliber pistol, bearing serial number US777533; and

Secured statements from MASSEY.

7. The actions of the government violated the Defendant's rights in that the items were illegally seized without a warrant. Any tangible evidence seized in connection with this search and seizure, including but not limited to the items listed above, was seized unlawfully and should be suppressed. Any statement obtained from the Defendant while unlawfully in the custody of law enforcement authorities were obtained in violation of the rights of the Defendant pursuant to the Fifth Amendment to the United States Constitution and should be suppressed.

II. FACTS

8. Special Agent Anthony M. Rotunno, is a Special Agent of the United States Department of Justice, Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF). He has been a Federal law enforcement agent for approximately twelve (12) years.

9. Agent Rotunno's duties include the investigations of the Federal Firearms Laws. He believes it is unlawful for any person who has been convicted of a felony to receive or possess a firearm, which has traveled in interstate or foreign commerce.

10. On August 29, 2014, United States Border Patrol Agents from the Fort Brown Border Patrol Station, while in performance of their official duties, encountered an armed individual, identified as John Frederick FOERSTER, in the brush in the Sable Palms area of Brownsville, Texas. During this encounter, FOERSTER allegedly turned and pointed a firearm at a USBP Agent, who then fired several shots at FOERSTER. FOERSTER is an alleged member of "Rusty's Rangers," an armed citizen militia group patrolling the border of the United States and Mexico.

11. Border Patrol Agents confiscated a ZASTAVA, Model: PAP M92PV, 7.62 x 39mm pistol, SN: MP2PV005143 from FOERSTER. Two other members of this militia group, Edward Varner and Kevin MASSEY, were located in the immediate vicinity of the shooting. Both of these individuals were allegedly armed as well.

12. After the initial shooting incident ended and while conducting the post-shooting investigation, five (5) firearms were taken into custody by the Cameron County Sheriff Investigator Sergio Padilla without probable cause or warrant. The firearms were described as:

1. ZASTAVA, Model: PAP M92PV , 7.62 x 39 mm pistol, SN: MP2PV005143 (carried by FOERSTER)
2. Llama, Model: 1911, .45 caliber pistol, SN:567266
3. Winchester, Model: 70, .243 caliber rifle, SN: G1914149
4. Springfield, Model: XDS, .45 caliber pistol, SN: XS664509
5. Centurion, Model: 39 Sporter, 7.62 x 39mm rifle, SN: 39NC02585

13. FBI Special Agent Caryn Chasteen and Cameron County Sheriff's Office Investigator Padilla interviewed FOERSTER. During the interview FOERSTER admitted to possessing the ZASTAVA, Model: PAP M92PV, 7.62 x 39mm pistol, SN: MP2PV005143.

14. MASSEY was not free to leave and then statements were taken from him without him being informed of his rights under the Fifth Amendment to the United States Constitution.

15. On October 16, 2014, Agent Rotunno spoke with Supervisory Border Patrol Agent Danny Cantu. SBPA Cantu was in the area of the shooting when the shots were fired and responded immediately to the scene. SBPA Cantu stated that he in-fact recovered the ZASTAVA, Model: PAP M92PV, 7.62 x 39mm pistol, SN: MP2PV005143 from FOERSTER and that he escorted MASSEY, FOERSTER AND Varner up the staging area for interviews

without having informed the parties of their Constitutional rights. Any statement obtained from the Defendant while unlawfully in the custody of law enforcement authorities were obtained in violation of the rights of the Defendant pursuant to the Fifth Amendment to the United States Constitution and should be suppressed.

16. On October 20, 2014, Agent Rotunno applied for a search warrant which was signed by Judge. The warrant was for the search of MASSEY's residence at Room 227 of the Value Place in Brownsville, Texas. The search warrant was secured by affidavit involving the events which took place on August 29, 2014.

III. CONCLUSION

17. The August 29, 2014 search and seizure was illegal and the evidence and statements should be suppressed along with any subsequent statements and evidence seized on October 20, 2014 as they are fruit of the poisonous tree.

WHEREFORE Kevin Lyndel Massey prays that the Court enter an order suppressing the evidence and statements listed above.

Signed: February 19, 2015

Respectfully Submitted,

_____/s/_____
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Attorney for the Defendant,
Kevin Lyndel Massey

CERTIFICATE OF SERVICE

I certify that a true and exact copy of the Defendant Kevin Lyndel Massey's Motion to Suppress Illegally Seized Evidence was electronically sent to William Hagan, Assistant United States Attorney on the 19th day of February, 2015.

_____/s/_____
Louis S. Sorola

CERTIFICATE OF CONFERENCE

I certify that I conferred with Mr. William Hagan, Assistant United States Attorney on the 2nd day of February, 2015 and he is opposed to this Motion to Suppress Illegally Seized Evidence.

_____/s/_____
Louis S. Sorola

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DEFENDANT

**ORDER ON DEFENDANT KEVIN LYNDEL MASSEY'S
OPPOSED MOTION TO SUPPRESS ILLEGALLY SEIZED EVIDENCE**

Defendant Kevin Lyndel Massey's Motion to Suppress Illegally Seized Evidence is
hereby:

_____ GRANTED

_____ DENIED

Signed in Brownsville, Texas on this the ____ day of _____ 2015.

Andrew S. Hanen
United States District Judge